NICHOLAS LANGOK CHANGKOK

v.

DIRECTOR GENERAL OF PRISONS & ORS

HIGH COURT SABAH & SARAWAK, MIRI
SULAIMAN DAUD JC
[ORIGINATING SUMMONS NO: 24-26-2000(MR)]
1 AUGUST 2001

ADMINISTRATIVE LAW: *Public servants - Dismissal of public officer - Disciplinary proceedings - Whether there was procedural impropriety - Whether dismissal invalid*

The plaintiff, a former prison officer, instituted proceedings against the defendants for wrongful dismissal on the grounds that in his appeal to the Disciplinary Appeal Board the plaintiff had not been given: firstly, the right to be heard; secondly, the right to an oral hearing and to examine witnesses; thirdly, the right to legal representation; and fourthly, the right to make sufficient representation.

The plaintiff, in his affidavit in reply, also raised certain issues in respect of the proceedings before the Disciplinary Board which were: (i) whether there was a failure to disclose to the plaintiff all the information received and considered by it in the finding of the plaintiff's guilt; (ii) whether there was a variance as to the punishment to which he was liable as stated in the show cause letter and that stated in the letter informing him of the Board's decision; (iii) whether the plaintiff was entitled to be personally present at the meeting of the Disciplinary Board to defend himself; and (iv) whether the ground of the decision of the Disciplinary Board had to be furnished to the plaintiff to facilitate his appeal.

Held:

[1] With regard to the first and fourth issues concerning the right to be heard and the right to make sufficient representation, the fact that the plaintiff was given the right to appeal in writing to the Disciplinary Appeal Board afforded him the right to be heard before the Board and that his written appeal thereto constituted sufficient representation thereto.

[2] With regard to the second issue on the right to an oral hearing and the right to examine witnesses, no such requirements were provided in the Public Services Disciplinary Board Regulations 1993 ("the Board Regulations") concerning the hearing of an appeal. The Disciplinary Appeal Board decides an appeal solely on the merits of the ground of appeal without receiving any further statement or evidence.

[3] With regard to the right of legal representation, even in proceedings before the Disciplinary Board, no provisions were made for the officer to be represented by counsel, and there was nothing in the Board Regulations to suggest that the plaintiff should be given such right before the Disciplinary Appeal Board.

[4] There was nothing in the Disciplinary Board's decision to suggest that it had taken into consideration any other extraneous information in finding the plaintiff guilty of the misconduct. The finding of the *prima facie* case against the plaintiff was only based on the report of the incident furnished to the plaintiff.

[5] The show cause letter and the letter informing the plaintiff of the Disciplinary Board decision both allude to punishment that may be imposed under reg. 28 of the Public Officers (Conduct and Discipline) Regulations 1993. Hence, the Disciplinary Board had not varied the punishment as contended.

[6] The right to be heard given by art. 135(2) of the Federal Constitution does not necessitate that the public officer concerned be given an oral hearing. Therefore, the plaintiff was not entitled to be personally present to defend himself.

[7] The ground of the charge had been communicated to the plaintiff and the answer to the charge came from the plaintiff himself, hence it could not have been said that the plaintiff was not given sufficient opportunities to make his appeal.

[Application dismissed.]

Case(s) referred to:

Ganasan Marimuthu v. Public Service Commission & Anor [1998] 4 CLJ 331 ***(refd)***

Ghazi Mohd Sawi v. Mohd Haniff Omar, Ketua Polis Negara Malaysia & Anor [1994] 2 CLJ 333 ***(refd)***

Halimatussaadiah v. Public Services Commission, Malaysia & Anor [1992] 1 CLJ 413; [1992] 2 CLJ (Rep) 467 ***(refd)***

Hamdan Ibrahim v. Lembaga Tatatertib Hospital Kuala Kangsar & Anor [2001] 1 CLJ 342 ***(refd)***

Inspector General of Police & Anor v. Alan Noor Kamat [1988] 1 MLJ 260 ***(refd)***

Krisnamoorthy Appannan v. Lembaga Tatatertib Perkhidmatan Awam, Pentadbiran Keretapi Tanah Melayu, Sentul, Kuala Lumpur [1999] 8 CLJ 314 ***(dist)***

Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang Anor v. Ultra Badi K Perumal [2001] 2 CLJ 527 ***(refd)***

Najar Singh v. Government of Malaysia & Anor [1974] 1 MLJ 138 ***(refd)***

Raja Abdul Malek Muzaffar Shah Raja Shahruzzaman v. Setiausaha Suruhanjaya Pasukan Polis & Ors [1995] 1 CLJ 619 ***(dist)***

Zainal Hashim v. Government of Malaysia [1979] 2 MLJ 276 ***(refd)***

Legislation referred to:
Federal Constitution, art. 135(2)
Public Officers (Conduct and Discipline) Regulations 1993, regs. 4(2)(g), (i), 25, 26, 27(2), 28(1), (2), (4), (12), 38(g)
Public Services Disciplinary Board Regulations 1993, regs. 13, 15, 16(2)

For the plaintiff - Merlyn Toh; M/s Bong & Co
For the defendants - Ishak Mohd Yusoff A-G's Chambers

Reported by Suresh Nathan

JUDGMENT

Sulaiman Daud JC:
By an originating summons dated 23 February 2000 the plaintiff, Nicholas Langok ak Changkok, applied to the court for the following order:

(a) a declaration that the dismissal of the plaintiff from his post as a Prison Officer Grade KX 12 at Penjara Pusat Miri, Sarawak is null and void;

(b) that the plaintiff be reinstated to the post held by him prior to his dismissal without loss of salary, benefits, entitlements of privileges; and

(c) costs.

The originating summons was supported by the plaintiff's affidavit affirmed on 22 February 2000 and his affidavit in reply (1) affirmed on 7 August 2000. The defendants filed in four affidavits in reply of which two were affirmed by Haji Omar Mohamad Dan, Ketua Pengarah Penjara Malaysia on 27 July and 16 August 2000, and two affirmed by Dato' Haji Ibrahim Haji Mohamad Shariff, the secretary to the public services commission, on 28 July and 17 August 2001.

At all material time until 8 April 1998 the plaintiff was employed as a Prison Officer at Penjara Pusat Miri, Sarawak. On 7 October 1997 he received a letter dated 25 September 1997 ("the show cause letter") issued by the Lembaga Tatatertib Perkhidmatan Awam Bagi Pegawai-Pegawai Dalam Kumpulan Sokongan (No. 1) ("the Disciplinary Board") commencing disciplinary proceedings against him for dismissal or reduction in rank on the grounds that he attempted to smuggle a packet of tobacco weighing 190 gm together with 20 pieces of tobacco wrapping paper ("the prohibited articles"), being prohibited articles within the meaning of the standing order of the Director General of Prison. Such act of the plaintiff is said to be in breach of subregulations (2)(g) and (i) of reg. 4 of the Public Officers (Conduct and Discipline) Regulations 1993 ("the Disciplinary Regulations"). As provided in the said sub-reg. (2)(g), an officer shall not be irresponsible, and in sub-reg. (2)(i), an officer shall not be insubordinate or conduct himself in any manner which can reasonably be construed as being insubordinate.

The show cause letter (exh NLAC2 in the plaintiff affidavit) called upon the plaintiff to make a written representation, containing the grounds upon which he relies to exculpate himself, within a period of not less than twenty-one days from the date of receipt of the letter. On 15 October 1997 the plaintiff made written representation to the disciplinary board where he admitted the attempt to take the prohibited articles into the prison but denied that he was smuggling the same for any other person. He explained that he is a smoker and that the tobacco is for his own consumption. He also apologised for his mistake and promised not to repeat such act in future.

On 4 February 1998, the plaintiff received a letter from the chairman of the Disciplinary Board dated 24 January 1998 (exh NLAC4) informing him that the board has found him guilty of the charge and he is liable to any one or any combination of two or more of the punishments specified in reg. 38 of the Disciplinary Regulations. He was also informed that before the Disciplinary Board impose any such punishments he was given the opportunity to put forward his mitigation plea to the chairman of the Disciplinary Board within twenty-one days from the date of the letter. This the plaintiff did where by letter dated 23 February 2000 to the chairman of the Disciplinary Board (exh NLAC5) he pleaded for leniency on the punishment to be imposed on him.

In spite of his mitigation plea, on 16 May 1998 the plaintiff received a letter dated 29 April 1998 from the chairman of the Disciplinary Board (Exh NLAC6) informing him that he has been dismissed under sub-reg. (g) of reg. 38 of the Disciplinary Regulations with effect from 8 April 1998. He was also informed of his right to make an appeal through his head of department to the Disciplinary Appeal Board. By a letter dated 18 May 1998 the plaintiff appealed to the Disciplinary Appeal Board for the substitution of the sentence of dismissal imposed on him with any one or any combination of two or more other sentences as provided in the said reg. 38. He further stated that it was his first disciplinary offence during the tenure of his office in the public service which is due to end in four years time and that he had school going children, a car and a house to maintain. He also repeated his promise not to repeat his mistake and pleaded for a more lenient sentence.

The plaintiff's appeal was dismissed by the Disciplinary Appeal Board who duly informed him of the decision by a letter dated 1 August 1998 (exh NLAC8) which was forwarded to him through the Director General of Prison, Malaysia. On 23 February 2000 the plaintiff instituted this proceedings against the three defendants herein for wrongful dismissal on the grounds stated in para. 25 of his supporting affidavit which read:

25. The ground upon which the said relief is sought are as follows:

(a) The Board of Appeal was wrong in law in dismissing the plaintiff because the plaintiff had no legal representation or advice by legal counsel;

(b) The Board of Appeal was wrong in law in dismissing the plaintiff because he did not get the chance to examine or cross-examine the witness.

(c) The Board of Appeal was wrong in law in dismissing the plaintiff because the plaintiff was not given the opportunity to make proper representation and therefore, unable to give evidence in support of his defence. In this matter, the plaintiff was only informed to make a written representation or explanation.

(d) The Board of Appeal was wrong in law in dismissing the plaintiff because there was no such hearing of fact and the plaintiff was in fact dismissed mechanically and/or arbitrarily.

(e) The Board of Appeal was wrong in law in dismissing the plaintiff because no full and sufficient enquiry was made to all the circumstances and factors including the backgrounds of the plaintiff in this case.

(f) The Board of Appeal was wrong in law in dismissing the plaintiff because the Board failed to consider the merit of this case.

It seems to me from the aforesaid averment there have been some confusion or misunderstanding on the part of the plaintiff and plaintiff's counsel on the difference between the entity "Disciplinary Board" which in Malay is "Lembaga Tatatertib" and "the Disciplinary Appeal Board" which in Malay is "Lembaga Rayuan Tatatertib". It is clearly stated in para. 25 of the plaintiff's affidavit as reproduced above that the act or ommission complained of by the plaintiff are those of the "Board of Appeal", which has to be construed as reference to the "Disciplinary Appeal Board" as distinct from "the Disciplinary Board". It is to be noted that the Disciplinary Board itself was not named as a defendant herein.

Proceedings Of The Disciplinary Appeal Board

Both the Disciplinary Board and the Disciplinary Appeal Board are constituted under the Public Service Disciplinary Board Regulations 1993 ("the Board Regulation"). The function of the Disciplinary Appeal Board as provided in reg. 13 thereof are to receive, consider and decide on any appeal with respect to any decision of the Disciplinary Board. The relevant provisions relating to the procedure of appeal to the board and the hearing of appeal by it are provided in regs. 15 and 16 of the Board Regulations respectively. Since the ground of this application as stated above is on the act or omission of the Disciplinary Appeal Board it is pertinent at this stage to reproduce the said regs. 15 and 16 in full:

15. (1) An appeal shall be made in writing by an officer referred to in regulation 14 (hereinafter referred to as "the appellant") to the Disciplinary Appeal Board through his Head of Department within fourteen days from the date on which the decision of the Disciplinary Board is communicated to him in writing.

(2) The Head of Department shall, not later than thirty days from the date of the receipt of the appeal from the appellant, submit such appeal to the Disciplinary Board together with his comments.

(3) On receipt of the appeal under subregulation (2) the Disciplinary Board shall cause to be prepared a copy of the records of proceedings of the Disciplinary Board, including the grounds on which the Disciplinary Board relied upon in arriving at its decision.

(4) The records of proceedings prepared under subregulation (3) together with the grounds of decision and the appellant's appeal shall be sent to the Disciplinary Appeal Board not later than thirty days from the receipt of the appeal by the Disciplinary Board.

16. (1) Upon receipt of the documents, the Chairman of the Disciplinary Appeal Board shall convene a meeting of the Disciplinary Appeal Board to consider the appeal.

(2) The Disciplinary Appeal Board shall decide an appeal solely on the merits of the grounds of appeal without receiving any further statement or evidence.

(3) Notwithstanding subregulation (2), the Disciplinary Appeal Board may, at its sole discretion and subject to the appellant's right of being heard, call for any statement or evidence from any person if it is of the opinion that it would be fair and just to do so.

(4) After considering the appeal, the Disciplinary Appeal Board may:

(a) remit the case to the Disciplinary Board for reconsideration;

(b) confirm the decision of the Disciplinary Board;

(c) confirm the decision of the Disciplinary Board as regards the appellant's wrong doing, but vary the punishment to that of a lesser one; or

(d) reverse the decision and punishment of the Disciplinary Board and acquit the appellant.

(5) The decision of the Disciplinary Appeal Board shall be final.

I will now turn to consider the act or omission of the Disciplinary Appeal Board complained of by the plaintiff in para. 25 of his supporting affidavit. I propose to deal with grounds stated therein under four headings, that is

whether, in the appeal to the Disciplinary Appeal Board the plaintiff has firstly been given the right to be heard, secondly has the right to an oral hearing and examine witnesses, thirdly has the right to legal representation or to counsel, and fourthly has been given the right to make sufficient representation.

Since the procedure of appeal and the hearing thereof is governed by the Board Regulations, I look primarily to the said Regulations to see whether the Disciplinary Appeal Board has erred in law in not giving those rights to the plaintiff as alleged.

With regard to the first and fourth issue on the right to be heard and the right to make sufficient representation, it is clearly provided in sub-reg. (2) of reg. 16 of the Board Regulations that the Disciplinary Appeal Board shall decide an appeal solely on the merits of the grounds of the appeal without receiving any further statement or evidence. However an appellant will be given further right to be heard before the board if it calls for any statement or evidence from any person. In the present application it is not disputed that the plaintiff has been notified of his right to appeal to the Disciplinary Appeal Board in the letter dated 29 April 1998 (exh NLAC6). This he did by his letter dated 18 May 1998 where he repeated the representation made to the Disciplinary Board (exh NLAC7). The plaintiff's appeal to the Disciplinary Appeal Board was received and considered by the Board (see Dato' Haji Ibrahim affidavit affirmed on 28 July 2000). In my view the fact that the plaintiff was given the right to appeal in writing to the Disciplinary Appeal Board afforded him the right to be heard before the Board and that his written appeal thereto constitutes sufficient representation thereto.

With regard to the second issue on the right to an oral hearing and the right to examine witnesses, suffice for me to say that no such requirements are provided in the Board Regulations in the hearing of an appeal. As provided in sub-reg. (2) of reg. 16 the Disciplinary Appeal Board decide an appeal solely on the merits of the ground of appeal without receiving any further statement or evidence. It is to be observed that even the right to be heard before the Disciplinary Board itself does not necessitate the person concerned be given an oral hearing (see *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang Anor v. Ultra Badi K Perumal* [2001] 2 CLJ 527 ("the *Ultra Badi* case"), *Najar Singh v. Government of Malaysia & Anor* [1974] MLJ 138). With regard to the right of legal representation, I also do not find anything in the said regs. 15 or 16 to suggest that the plaintiff should be given such right before the Disciplinary Appeal Board. Even in proceedings before the Disciplinary Board, no provisions are made in the Disciplinary Regulations for the officer to be represented by counsels. It is only if a committee of inquiry is appointed by the Disciplinary Board that the committee has a discretion to allow him to be represented by an officer of the public service

or, in exceptional cases, by an advocate (see *Ganasan Marimuthu v. Public Service Commission & Anor* [1998] 4 CLJ 331).

I can dismiss this application on the aforesaid grounds alone as the plaintiff has failed to prove his case against the Disciplinary Appeal Board, the second defendant herein. However in his affidavit in reply (1) the plaintiff, in contrast to his supporting affidavit, mounted a collateral attack on the proceedings before the Disciplinary Board, which is not even named as a defendant herein. No further reference was made to the Disciplinary Appeal Board in the said affidavit. Such was the state of confusion of the plaintiff and his counsel on the identity and entity of the two Boards.

Since there has been issues raised in respect of the proceedings before the Disciplinary Board in such subsequent affidavit and in submission, for completeness I will proceed to consider the same.

Proceedings Before The Disciplinary Board

As stated earlier the allegation in respect of the conduct of the proceedings by and before the Disciplinary Board only arose in the plaintiff affidavit in reply (1), in response to the defendants two earlier affidavits. From the assertion and averment made in the said affidavit and the submission of the plaintiff's counsel, in my view, four further question of fact and law arise for determination, namely:

(a) whether there has been a failure to disclose to the plaintiff all the information received and considered by it in the finding of the plaintiff's guilt.

(b) whether there is a variance between the punishment to which he is liable as stated in the show cause letter (exh NLAC2) and that stated in the letter dated 24 January 1998 (exh NLAC4).

(c) whether the plaintiff is entitled to be personally present at the meeting of the Disciplinary Board to defend himself.

(d) Whether ground of the decision of the Disciplinary Board has to be furnished to the plaintiff to facilitate his appeal.

It is convenient to begin by examining the provisions of the Public Officers (Conduct and Discipline) Regulations 1993, being the law governing the disciplinary proceedings of public officer. The conditions for dismissal or reduction in rank, to which the present case applies, are provided in reg. 25, and in so far as relevant are as follows:

25(1) Subject to the provisions of subregulation (2), no officer shall be dismissed or reduced in rank in any disciplinary proceedings under this Part unless he has been informed in writing on the grounds on which it is proposed to take an action against him and has been afforded a reasonable opportunity of being heard.

Regulation 26 of the Disciplinary Regulations requires the chairman of the disciplinary authority, where there is an alleged breach of discipline by an officer to determine the nature of the disciplinary offence. If it is of a nature which merit punishment of dismissal or reduction in rank, then the provisions of reg. 28 of the Disciplinary Regulations applies. The said reg. 28 provides as follows:

28 (1) The appropriate Disciplinary Authority sitting to consider a case where the breach of discipline complained of has been found to be of a nature which merits a punishment of dismissal or reduction in rank, shall consider all the available information and where it appears that there is a *prima facie* case against the officer for dismissal or reduction in rank, the appropriate Disciplinary Authority shall direct that a statement containing the facts of the breach of discipline alleged to have been committed by the officer and any proposed ground on which the officer is to be dismissed or reduced in rank be sent to him and shall call upon him to make a written representation, containing grounds upon which he relies to exculpate himself, within a period of not less than twenty-one days from the date of receipt of the charge.

(2) Where, after considering the representation made pursuant to subregulation (1), the appropriate Disciplinary Authority is of the opinion that the breach of discipline or misconduct by the officer does not merit the punishment of dismissal or reduction in rank, the appropriate Disciplinary Authority may impose on the officer any lesser punishment as it deems fit and proper.

(3) If the officer does not furnish any representation within the period specified in subregulation (1), or if the officer furnishes a representation which does not exculpate himself to the satisfaction of the appropriate Disciplinary Authority, the Disciplinary Authority shall then proceed to consider and decide on the dismissal or reduction in rank of the officer.

(4) Where the appropriate Disciplinary Authority is of the opinion that the case against the officer requires further clarification, it may appoint a Committee of Investigation comprising not less than two government officers who are senior to the officer under investigation.

(5) The Head of Department of the officer shall not be a member of the Committee appointed under subregulation (4).

(6) The Committee of Investigation appointed under subregulation (4):

(a) shall inform the officer of the date when the question of his dismissal or reduction in rank will be brought before the Committee of Investigation and, if the Committee of Investigation is of the view that the officer be allowed to appear, that he shall present himself before the Committee to exculpate himself; and

(b) may call and examine witnesses or take any such action as it thinks necessary and proper for obtaining further clarification regarding the case.

(7) If witnesses are called and examined by the Committee of Investigation, the officer shall be given an opportunity to be present and to question the witnesses on his own behalf and no documentary evidence shall be used against him unless he has previously been supplied with a copy thereof or given access thereto.

(8) The Committee of Investigation may permit the Government or the officer to be represented by an officer in the public service or, in exceptional cases, by an advocate and solicitor and, subject to any reasonable and necessary adjournment to enable the officer himself to present his case in person, the Committee of Investigation may withdraw such permission at any time:

Provided that where the Committee of Investigation permits the government to be represented, it shall also permit the officer to be similarly represented.

(9) If, in the course of carrying out the investigation, further grounds for dismissal or reduction in rank of the officer are disclosed, the Committee of Investigation shall inform the said grounds to the appropriate Disciplinary Authority; and if the appropriate Disciplinary Authority thinks fit to proceed against the officer on such grounds, the officer shall be given a written statement of the said grounds and the procedure set out in subregulations (1), (2) and (3) shall be followed.

(10) Where an officer required to appear before a Committee of Investigation on the date and time appointed for the hearing fails to appear, and if no sufficient ground is shown for an adjournment, the Committee of Investigation may proceed to consider and decide on the complaint or it may adjourn the hearing to a future date.

(11) Upon completion of its investigation, the Committee of Investigation shall make a report to the appropriate Disciplinary Authority. If the appropriate Disciplinary Authority is of the opinion that the report is not clear in any particular respect or that further investigation is

required the matter may be referred back to the Committee of Investigation to carry out further investigation and to make further report.

(12) If, after considering the representation under subregulation (1) and, where a Committee of Investigation is appointed, the report of such Committee, the appropriate Disciplinary Authority finds:

(a) that the officer is guilty of misconduct and should be dismissed or reduced in rank, the Disciplinary Authority shall forthwith impose the appropriate punishment;

(b) that the officer is guilty of misconduct but such misconduct does not merit dismissal or reduction in rank but merits a lesser punishment, the appropriate Disciplinary Authority shall impose on the officer such lesser punishment as it deems fit and proper; or

(c) that the officer is not guilty of misconduct, the appropriate Disciplinary Authority shall acquit him.

Having reproduced the relevant rules, I now turn to consider the issues arising.

Whether There Has Been Failure To Disclose All The Information Received

The learned counsel for the plaintiff contended that the defendants in finding the plaintiff's guilt have taken into consideration "segala maklumat yang diterima" but no such information was made available to the plaintiff. He submitted that the failure on the part of the Disciplinary Board to furnish to the plaintiff the information so received amounted to such a denial of natural justice as to entitle the court to set aside the disciplinary proceedings on this ground. The first case cited by the learned counsel in support of the proposition is *Raja Abdul Malek Muzaffar Shah Raja Shahruzzaman v. Setiausaha Suruhanjaya Pasukan Polis & Ors* [1995] 1 CLJ 619. In that case the first defendant commenced disciplinary proceedings against the appellant for gross dereliction of duty and corruption. No oral hearing was held and by a letter dated 4 April 1990, the first defendant informed the plaintiff of the commission's decision to dismiss him after considering the plaintiff's explanations in his two letters, and "other information". It was held, among others, that the words "and other information" in the letter of 4 April 1990 left a reasonable man with the distinct impression that the defendant had considered material information that was never put to the plaintiff. A fair procedure includes the duty of an arbiter not to take into account matters that have not been first put to the accused with an opportunity for him to rebut them. The failure of the learned trial judge to address his mind to this aspect has occasioned a miscarriage of justice.

With respect in my view the facts in *Raja Abdul Malek* case can be clearly distinguished from the fact in the present case. In the *Raja Abdul Malek* case the statement that the disciplinary authority has considered "serta lain-lain maklumat yang berkaitan" appeared in the letter informing the appellant of its decision to dismiss him. However in the present case I did not find anything in the corresponding letter dated 24 January 1998 (exh NLAC4) sent to the plaintiff informing him of the Disciplinary Board's decision to suggest that the Board has taken into consideration any other extraneous information in finding the plaintiff guilty of the misconduct. The said letter in so far as relevant read:

> Lembaga Tatatertib di dalam mesyuarat yang ke 1/1998 pada 13.1.1998 setelah menimbangkan dengan teliti pertuduhan ke atas tuan melalui surat pertuduhan bil. (4) dlm. IPPM (5) FP. No 325 (SWK) bertarikh 25.9.1997 dan jawapan yang diberikan oleh tuan melalui surat bertarikh 15.10.1997, memutuskan bahawa tuan bersalah atas pertuduhan tersebut.

It is clear in the present case the expression "setelah menimbangkan segala maklumat yang diterima" or in its English translation "after considering all the available information" only appeared in the show, cause letter (exh NLAC2) in determining that there is a *prima facie* case against the plaintiff. The said show cause letter in so far as relevant read:

> Lembaga Tatatertib, **setelah menimbangkan segala maklumat yang diterima**, berpendapat bahawa tuan patut dikenaan tindakan tatatertib dengan tujuan buang kerja atau turun pangkat di bawah Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) atas pertuduhan berikut: (emphasis is added).

In my view the expression "setelah menimangkan segala maklumat yang diterima" as appearing in the show cause letter is consistent with the requirement of the said sub-reg. (2) of reg. 28 which require the disciplinary authority to 'consider all the available information' in determining whether or not there is a *prima facie* case against the accused. It is to be noted that Hj Omar Mohamed Dan, a member of the Disciplinary Board, in his affidavit in reply stated in paras. 6, 7, 8 and 9 as follows:

> 6. A report of the incident was made to Lembaga Tatatertib Kumpulan Sokongan (No 2) Penjara Pusat Miri/Limbang.
>
> 7. In accordance with rule 26 Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) the Pengerusi Lembaga Tatatertib Kumpulan Sokongan (No 2) Penjara Pusat Miri/Limang considered the matter and found that the breach of discipline is of a nature which merits a punishment of dismissal or reduction in rank.
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> 8. The matter was then referred to the Lembaga Tatatertib Perkhidmatan Awam Kumpulan Sokongan (No. 1) Jabatan Penjara Malaysia to consider

whether there appears a *prima facie* case against the plaintiff for dismissal or reduction in rank. The Lembaga aforesaid found that there is a *prima facie* case against the plaintiff and decided that a charge be framed against him.

9. In accordance with rule 28(1) Peraturan-Peraturan Pegawai Awam (Kelakuan Dan Tatatertib) 1993 a charge was framed and given to the plaintiff as per exhibit NLAC2 of the Plaintiff's affidavit. The plaintiff was given 21 days to make a representation in writing stating the grounds on which he would rely to exculpate himself.

The aforesaid averment is self explanatory. It is clearly stated therein that only the report of the incident was referred the Disciplinary Board and that the Board only considered that report in finding that there is *prima facie* case against the plaintiff and deciding that a charge be framed against him. I did not find anything in the said reg. 28 to require such report to be furnished to the plaintiff. Subregulation (1) thereof only require a statement containing the facts of the breach of discipline alleged to have been committed by the officer and any proposed ground on which the officer is to be dismissed or reduced in rank to be sent to the officer concerned. It is also clear from Haji Omar affidavit that the Disciplinary Board did not appoint any committee of inquiry under sub-reg. (4) of reg. 28 to conduct further investigation into the complaint.

I am also of the view that the show cause letter (exh NLAC2) has fully complied with the requirements of sub-reg. (1) of reg. 28 where the facts of the breach alleged to have been committed by the plaintiff and the proposed ground on which the plaintiff is to be dismissed were fully laid down. No reasonable person would have any difficulty in responding to the allegation made.

The other case cited is *Krisnamoorthy Appannan v. Lembaga Tatatertib Perkhidmatan Awam, Pentadbiran Keretapi Tanah Melayu, Sentul, Kuala Lumpur* [1999] 8 CLJ 314. Similarly the fact of that case is easily distinguishable from the fact of the present case. In that case a committee was appointed to investigate into the alleged offence but the report of the committee which was deliberated by the disciplinary Board was not supplied to the plaintiff. In contrast in the present case the finding of the *prima facie* case against the plaintiff was only based on the report of the incident furnished to the plaintiff. In the result the plaintiff argument on this issue also fails.

Whether The Punishment Stated In Exh NLAC2 Was Varied in Exh. NLAC4

The plaintiff in para. 8 of his affidavit in reply stated that the punishment stated in the show cause letter (exh NLAC2) was varied in the letter informing him of the Board decision (exh NLAC4). At once I will say that such an

averment is fallacious and devoid of merit. Upon scrutiny of the show cause letter it is clearly stated therein as follows:

> Jika tuan didapati bersalah ke atas pertuduhan di atas, tuan boleh dihukum mengikut peraturan 38, Peraturan-Peraturan Pegawai Awam (Kelakuan Dan Tatatertib) 1993.

Whereas the second letter informing him of the Board decision set out in full the punishment that may be imposed under the said reg. 38. There is nothing in both letters to suggest that the Disciplinary Board has changed its stand on the punishment as contended.

Whether The Plaintiff Is Entitled To Be Personally Present To Defend Himself

This question is directly related to the right to an oral hearing before a disciplinary authority. In the *Ultra Badi* case one of the question referred to the Federal Court for determination is whether art. 135(2) of the Federal Constitution require the relevant disciplinary authority to afford a public officer an oral hearing. The Federal Court answered the said question in the negative. It was held that the right to be heard given by the said art. 135(2) of the Federal Constitution does not necessitate that the person concerned be given an oral hearing. The Federal Court arrived at such a conclusion after referring to several authorities earlier decided on the same issue by the highest court in the country including the Federal Court case of *Najar Singh v. Government of Malaysia & Anor* [1974] 1 MLJ 138 (affirmed on appeal by the Privy Council), the Privy Council case of *Zainal Hashim v. Government of Malaysia* [1979] 2 MLJ 276 and the Supreme Court case of *Ghazi Mohd Sawi v. Mohd Haniff Omar, Ketua Polis Negara Malaysia & Anor* [1994] 2 CLJ 333. The plaintiff contention on this ground must therefore fail.

Whether The Ground Of Decision To Be Furnished To The Plaintiff

The plaintiff argued that the failure on the part of the Disciplinary Board to supply him with the record of proceedings amounted to breach of procedural justice. Before considering the plaintiff's argument it is necessary to have another look at reg. 15 of the Board Regulation referred to earlier which regulate the procedure of appeal. As provided therein, in case of appeal the Disciplinary Board is required to prepare a copy of its records of proceedings, including the grounds of its decision, which has to be submitted together with the appellant's appeal to the Disciplinary Appeal Board. There is no requirement thereunder for such record to be furnished to the appellant.

In determining the plaintiff's contention it is now necessary to have another look at the letter dated 24 January 1998 (exh NLAC4). It is clearly stated in the said letter that the Board has found the plaintiff guilty after giving careful

consideration to the charge against him as contained in the show cause letter dated 25 September 1997 and the answer furnished by him in the letter dated 15 October 1997. In other words in finding the plaintiff guilty of the misconduct the Disciplinary Board only gave consideration to two factors, that is firstly the charges against him and secondly the representation made by him in respect of the charge. As the ground of the charge has been communicated to the plaintiff and the answer to the charge came from the plaintiff himself it cannot be said that the plaintiff was not given reasonable or sufficient opportunities to make his appeal. Any reasonable person would also have no difficulty in stating the ground of his appeal based on the relevant particulars.

In the course of reading his written submission, the learned counsel for the plaintiff addressed the attention of the court to two other alleged procedural irregularities which will have the effect of nullifying the disciplinary proceedings. Firstly it was argued that the Disciplinary Board has failed to make a finding of guilt against the plaintiff before imposing the order of dismissal, and secondly the plaintiff was not given the second opportunity to be heard in mitigation upon the punishment to be meted out to him.

These two arguments gave rise two further questions to be answered, firstly whether the Disciplinary Board is required to make a finding of guilt before dismissing the plaintiff; and secondly whether the plaintiff has the right to make a separate representation before punishment is meted out to him.

Whether The Disciplinary Board Is Required To Make A Finding Of Guilt

The learned counsel for the plaintiff referred to the case of *Hamdan Ibrahim v. Lembaga Tatatertib Hospital Kuala Kangsar & Anor* [2001] 1 CLJ 342. In that case the court was faced with almost similar question as to whether the disciplinary authority is required to make a finding of guilt before punishment could be imposed on him. The only difference is that in *Hamdan* case the court is concerned with the procedure in disciplinary cases not with a view to dismissal or reduction in rank under reg. 27 of the Disciplinary Regulations, whereas the present case is related to the procedure with a view to dismissal under reg. 28. In delivering his judgment VT Singham JC stated at pp. 378, 379:

> It would appear from the wordings of reg. 27(2), there must be an express finding of guilt and that finding of guilt is a pre-requisite and or a necessary condition before any punishment can be imposed but O. 26(4) of Bab D 1980 does not provide for such requirement. Therefore, to this extent the facts in *Halimatussaadiah*'s case can be distinguished with the facts relating to the present case and by implication and taking into account the letter dated 14 June 1996 exh. SY3 to be read together with regulation sub(2) of reg. 27, the disciplinary board must first make a finding of guilt against the plaintiff before proceeding to the second stage to impose the punishment.

In *Halimatussaadiah v. Public Services Commission, Malaysia & Anor* [1992] 1 CLJ 413; [1992] 2 CLJ (Rep) 467, Eusoff Chin, J (as he then was) held that O. 26(4) of GO 'D' does not require the Public Services Commission to make a finding of guilt before dismissing the plaintiff. The Public Services Commission was only required to decide whether the plaintiff's explanation had exculpated her to the satisfaction of the Commission. In *Ultra Badi* case Abdul Malek Ahmad FCJ made the same observation where he stated (at p. 551) that under para (4) of General Orders. 26 of the General Orders the appellant therein is not even required to make a finding of guilt.

The General Orders (Chapter D) has now been repealed and re-enacted as the Public Officers (Conduct and Discipline) Regulations 1993 which came into force on 15 December 1993. The corresponding provisions of General Order 26 of the General Orders is reg. 28 of the Disciplinary Regulations which made some minor modification thereto. Subregulation (12) of the said reg. 28 provides as follows:

> (12) If, after considering the representation under subregulation (1) and, where a Committee of Investigation is appointed, the report of such Committee, the appropriate Disciplinary Authority finds:
>
> (a) that the officer is guilty of misconduct and should be dismissed or reduced in rank, the Disciplinary Authority shall forthwith impose the appropriate punishment;
>
> (b) (not relevant)
>
> (c) (not relevant).

As can be seen in so far as it relates to the finding of guilt there is a substantial similarity between the wording of the said sub-reg. (12) of reg. 28 and that of sub-reg. (2) of reg. 27 referred to in *Hamdan*'s case. In my view, from the wording of the said sub-reg. (12) there is also a requirement thereunder for the Disciplinary Board to make a finding that the officer is guilty of the misconduct, whereupon it shall forthwith impose the appropriate punishment. Since the punishment is to be imposed forthwith upon such finding of guilt, in my opinion, both the finding guilt and the punishment are to be considered in one composite exercise. The principle laid down in *Halimatussaadiah*' case on this point may no longer be applicable and need not be followed since that case was decided on the interpretation of the repealed General Order 26(4) of the General Orders.

Having stated the rules it is now necessary to have another look at the letter dated 24 January 1998 (exh NLAC4) to see whether the Disciplinary Board made any finding of guilt before proceeding to dismiss the plaintiff. The said letter NLAC4 is so far as relevant read:

> Lembaga Tatatertib di dalam mesyuarat yang ke 1/1998 pada 13.1.1998 setelah menimbangkan dengan teliti pertuduhan ke atas tuan melalui surat pertuduhan bil. (4) dlm. IPPM(S)FP.No 325(SWK) bertarikh 25.9.1997 dan jawapan yang diberi oleh tuan melalui surat bertarikh 15.10.1997, **memutuskan tuan bersalah atas pertuduhan tersebut**. (emphasis added).

From the wording of the said letter it is clear to me that the Disciplinary Board did in fact made a finding that the plaintiff was guilty of the charge. It is obvious that the argument put forward by the plaintiff's counsel on this point is not consistent with the fact and the documentary evidence (exh NLAC4) before me. In the result the submission on his ground also fail.

Whether The Plaintiff Has The Right To Make Second Representation Before Punishment Is Meted

The precise authority on this point is without doubt the recent Federal Court decision in *Ultra Badi* case where the same question was referred to and answered by the court. On this issue, his Lordship Abdul Malek Ahmad FCJ, in delivering the judgment of the Federal Court has authoritatively stated at p. 551:

> Taking all the above into consideration, we are of the view that the General Orders, in detailing the procedures therein, have sufficiently complied with Art. 135(2) of the Federal Constitution and, in the process, are in accord with the concept of natural justice and procedural fairness. As succinctly stated by the learned leading senior federal counsel in his submissions and as propounded in the long line of authorities considered, there is certainly no separate right to make representations upon the punishment that ought to be meted out to the officer to be dismissed or reduced in rank. In fact, under para. (4) of General Order 26 of the General Orders, the first appellant is not even required to make a finding of guilt which strongly indicate that there is only one hearing for a show cause letter issued under that General Order. We therefore find that no injustice had been occasioned to the respondent by the failure to hear his mitigation separately.

In the Supreme Court case of *Inspector General of Police & Anor v. Alan Noor Kamat* [1988] 1 MLJ 260, it was held that there is no necessity for the disciplinary authority to give an officer another opportunity of being heard before the punishment is imposed if the show cause letter had included the proposed punishment, for example by the inclusion of such statement as 'the proceeding is taken against you with a view to dismissal or reduction in rank.'

In the present case it is not disputed that the show cause letter forwarded to the plaintiff stated in clear terms that the disciplinary proceedings commenced against him is with the view to dismissal and reduction in rank. Hence there is no necessity for the plaintiff to be given another chance to be heard. The

requirement under the said sub-reg. (12) for the appropriate punishment to be imposed forthwith upon the finding of guilt clearly indicate that the two procedures, that is the finding of guilt and the imposition of punishment, have to be considered and carried out in one composite exercise without the need to call for separate representations on the question of punishment.

However upon close scrutiny of the letter (exh NLAC4), I cannot help but remark that the plaintiff's counsel contention on this matter is obviously frivolous and vexatious as the Disciplinary Board had in fact through the said letter given the opportunity to the plaintiff to plead in mitigation before punishment was meted against him. Paragraph 3 of the said letter NLAC4 read:

> 3. Sebelum Lembaga Tatatertib menjatuhkan apa-apa hukuman seperti dinyatakan dalam perenggan 2 di atas, **tuan adalah dengan ini diberi peluang merayu terhadap hukuman tersebut**. Rayuan tuan hendaklah dikemukakan kepada Pengerusi Lembaga Tatatertib, melalui Ketua Jabatan tuan, dalam tempoh 21 hari daripada tarikh tuan menerima surat ini. (emphasis added)

For all the reasons stated above I dismissed with cost the application for the declaration and other ancillary and consequential reliefs and orders sought in connection therewith.